BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of the Dispute Between: STUDENT, Petitioner, and CORONA-NORCO UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005070169

DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 20, 21 and 22, 2005, in Norco, California.

James D. Peters III, Educational Consultant, represented petitioner Student, who did not appear. Valerie Aprahamian, Educational Consultant, was present throughout the hearing. Either Mother or Father, petitioner's parents, was present throughout the entire hearing.

Constance M. Taylor, Attorney at Law, represented respondent Corona-Norco Unified School District. Penny Valentine, the District's Administrative Director, was present throughout the hearing.

On September 22, 2005, the matter was submitted.

FACTUAL FINDINGS

A Brief Overview of Special Education Law

1. Under the Individuals with Disabilities Education Act (IDEA), schools which receive federal funding must provide every student with a qualifying disability with a "free

appropriate public education" (FAPE). Under IDEA, a school district must provide a disabled student with a basic floor of educational opportunity consisting of access to specialized instruction and services individually designed to meet the student's unique needs and to provide the student with educational benefit. However, IDEA does not require a school district to provide a disabled student with the best possible education, nor does IDEA compel a school to maximize the disabled student's potential and achieve outstanding results.

The primary vehicle for the delivery of a FAPE is an Individualized Education Program (IEP). School districts create an IEP for each disabled student through a cooperative process involving student's parents and school officials, who form an "IEP team." While a parent has the absolute right to participate in the IEP process and a school district cannot engage in conduct that seriously hampers that right, a violation of IDEA does not exist simply because an IEP does not reflect or include a parent's desires or wishes. Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student.

An IEP must include the student's current educational status, annual goals, the special education services and other supplementary services the school will provide to the student and the extent to which the student will receive an education in the least restrictive environment (LRE). Under the LRE component, a disabled student should be integrated with non-disabled students to the extent possible. A student with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in a regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily.

IDEA establishes a series of procedural safeguards to ensure that a parent of a disabled student is notified of decisions affecting the student and the parent is given an opportunity to object to those decisions. A parent has the right to participate in the student's educational evaluation and in the development of the IEP, and a parent has the right to receive written notice before any change in an evaluation or IEP.

If a parent is dissatisfied with the school's actions, the parent must be given an opportunity to present complaints regarding the student's evaluation or the student's educational placement or by the perceived failure of the school district to provide the student with a FAPE. A parent has a right to a due process hearing upon the filing of a complaint.

Preliminary Matters

2. Student is a 16 year old special education student who attends Santiago High School, a high school within the Corona-Norco Unified School District (the district). Student is a kind and shy young man who enjoys interacting with his family and with disabled and non-disabled peers alike. Student's parents are deeply committed to their son's welfare and they have made sincere efforts to ensure that Student receives not only a suitable

education, but also competent medical and psychiatric care together with meaningful family and community experiences.

3. Student has received special education services from the district as a result of mild to moderate mental retardation and several other health impairments including seizure-like activities. The possibility of an attention deficit hyperactivity disorder and a bi-polar disorder was considered by family members, educators and others. Student was recently diagnosed with a Pervasive Developmental Disability (Not Otherwise Specified), a diagnosis on the autistic spectrum.

Student stutters when he is anxious or upset. He does not have a good concept of personal space, often engaging in inappropriate touching or hugging. Student has some "meltdowns" in class which include crying and putting his head on his desk. Student often skips about the campus, which is age-inappropriate behavior.

A May 1994 speech and language evaluation concluded Student exhibited significant delays in vocabulary, concept development, and understanding and using language. He had a fluency disorder (stuttering) which called adverse attention to his speech. It was determined Student would benefit by participating in a speech and language program with a strong emphasis on oral language development. Student participated in a speech and language program for the next six years.

In a report dated June 1999, a speech and language pathologist observed that Bake had been in speech and language programs since December 1993. The speech and language pathologist recommended Student be dismissed from the formal speech and language program because Student had demonstrated continuing language development within the classroom, because special day class settings were structured to support his development of receptive and expressive language skills, and because his future needs for receptive and expressive language development could be provided within a classroom setting.

Throughout his enrollment with the district, Student has received special education services in language arts, mathematics, history, social science, spelling and science, the core curriculum. IEP plans written before May 20, 2004, indicated Student's cognitive abilities made it difficult for him to successfully progress in the general curriculum. Those IEP plans also concluded Student would benefit from placement in a special education programs for 70-80 percent of the day and from placement in general non-academic programs for about 20-30 percent of the day.

A comment in the IEP plan dated May 20, 2003, stated, "Attempts have been made to have Student spend part of his day in a less restrictive environment during this school year; however, he became anxious and this interfered with his success in other classes." Student's mother signed that IEP and specifically approved it.

4. The Corona-Norco Unified School District provides educational services and supports to at least 47,000 students from kindergarten through 12th grades. These students

and their families live in a 163 square mile geographical area located in west Riverside County, California. The district employs approximately 2,500 certificated persons who provide educational services at 31 elementary schools, five intermediate schools, and four large comprehensive high schools.

5. Until shortly before the request for a due process hearing was filed in this matter, Student and his many other siblings attended schools within the district for more than two decades without disputes between Student's parents and the district.

The May 20, 2004 Individualized Education Program Plan

6. On May 20, 2004, several members of Student's individualized education team met to review Student's annual IEP at Santiago High School. Mother, the student's mother, Tina Hosko (Ms. Hosko), a special education teacher, and Robin Sutherland (Ms. Sutherland), a special education teacher, were present throughout the IEP entire meeting. Susan Rex (Ms. Rex), a special education teacher and the administrative designee, was briefly present during the IEP meeting.

A regular education teacher was *not* present for any part of the May 20, 2004 IEP meeting, although the signature of "Dennis Taylor" was later affixed to Student's written IEP plan in an area designated "General Education."

During the meeting, Student's strengths were identified, the mother's concerns were reported, Student's post-secondary objectives were identified, Student's activities were reported, his progress in meeting prior IEP goals was reviewed, and new annual goals and benchmarks were established which included present levels of performance. Members of the IEP team concluded that Student's "disability prevents him from fully accessing the general education." The annual IEP plan included various, meaningful accommodations and supports including small group instruction, repetition for mastery, and extra time for test assignments. The IEP plan stated the district would provide Student's parents with information on conferences, in-service training and written materials. The IEP plan stated the district's regular disciplinary procedures applied to Student.

Student's IEP program for the 2004-2005 school year included his placement in special education classes in language arts, math, health, history, art and science (83 percent of the school day) and his placement with non-disabled peers in a physical education class and at lunch, breaks, special events, extra-curricular activities and assemblies (17 percent of the day). The development of social skills and communication skills (speech and language) was identified as Student's main educational focus. Student was determined to be eligible for an extended school year and for curb to curb transportation.

7. Although Student's mother testified she asked for a speech and language assessment and the provision of speech and language services for Student during the May 20, 2004 IEP meeting, there was no indication of that request in the IEP. No other person attending the May 20, 2004 IEP meeting recalled such a request.

Student's mother reviewed an Alternative Assessment Participation form in which it was agreed that because Student could not meet the performance level required by statewide exit assessments, even with extensive accommodations, Student would take an alternative assessment. There was no reasonable basis on which Student's mother could have concluded the Alternative Assessment Participation form was a request for a speech and language assessment or a request for behavioral services.

8. Student's mother signed the May 20, 2004, IEP plan. She did not place an asterisk next to her name to indicate any disagreement with the plan, nor did she submit a dissenting statement to be attached to the plan.

The 2004-2005 School Year

9. Student was provided educational services consistent with the May 20, 2004 IEP for most of the 2004-2005 school year. Student's special education teachers were Ms. Hosko and Ms. Sutherland. Student participated in the Life Skills program. Larry Baker (Mr. Baker) was Student's general education P.E. teacher.

During the 2004-2005 school year, several incidents caused the mother some distress. One (belated) concern was the absence of a general education teacher at the May 2004 IEP meeting. Other concerns included reports from Student that his teachers and aides were yelling at him, reports from Student that he was being bullied in his physical education class, warnings from Student's teachers about Student's relationship with a female special education student, Student's two-day suspension from school for telling another person he "wanted to kill" Ms. Sutherland, the asserted lack of appropriate therapeutic intervention following the suspension, Student's inability to participate in a swimming class, and the determination that Student carried a diagnosis on the autism spectrum.

Jurisdictional Matters

10. By letter dated June 20, 2003, Charles Appel, Attorney at Law, and James D. Peters III (Peters), Executive Director of T.O.P. Educational Consultants, requested a due process hearing because "the district has failed to provide a free appropriate public education by refusing to provide an appropriate individual education program . . . [including] 1. Speech and Language Therapy 2x week 1 hour
. . . 4. Functional Analysis Assessment, 5. Inclusive Education Program, 6. Individual Aide, [and] 7. Parent Training . . . "

11. A due process hearing was set for July 21, 2005.

12. Thereafter, the district moved to dismiss the claim or, in the alternative, to continue the hearing date. Petitioner opposed the motions.

13. On July 12, 2005, Administrative Law Judge Marilyn A. Woollard denied the district's motion to dismiss, but granted the motion to continue the hearing due to the inability of the district's representative to participate in multiple hearings simultaneously and the district's need for additional time to prepare for the hearing. ALJ Woollard continued the hearing to September 20, 2005.

14. On September 20, the record was opened after Peters, Valerie Aprahamian (Aprahamian) and the mother arrived at the hearing 20 minutes after the hearing was noticed to commence. Sanctions were imposed against Peters for his unreasonable and unexcused failure to arrive on time.

The issues to be decided in the due process hearing were identified.

The district's motion to quash 22 subpoenas served on September 19, 2005, was considered. Eleven subpoenas were quashed when petitioner's representative did not provide adequate offers of proof concerning the testimony of those witnesses to support the enforcement of them.

Notwithstanding various technical defects in the composition and service of the remaining eleven subpoenas, the district was ordered to have eleven district-employee witnesses available for the hearing.

Opening statements were given.

On September 20, 21 and 22, 2005, sworn testimony and documentary evidence were received.

On September 22, 2005, closing arguments were given, the record was closed and the matter was submitted.

Issues

15. The parties identified the following issues for purposes of the hearing:

Did the district fail to provide or fail to implement a FAPE for Student in 2004-2005 school year? More specifically, did the district:

A. fail to provide one hour of speech and language services twice a week;
B. fail to provide Student with an individual aide
C. fail to place Student in a general education classroom with appropriate modifications and supports,
D. fail to provide Student's parents with training, or
E. fail to request a functional analysis assessment (FAA)

when it had the duty to do so?

Contentions

16. Petitioner contended the May 20, 2004 IEP was illegal because a general education teacher did not attend that meeting; the meeting was inadequate because a speech and language therapist did not attend the meeting and the administrative designee made a token appearance; oral agreements concerning the student's IEP were not reduced to writing and the district failed to implement those agreements; the parent's consent to Student's placement in a special education program (including the Life Skills program) was not informed; Student was not placed in the least restrictive environment; Student was entitled to a 1:1 aide; the district permitted Student to be bullied by teachers and students; and Student should have been provided with a functional analysis assessment and therapeutic interventions following his suspension from school.

17. The District claimed Student's mother knowingly and voluntarily agreed to the May 20, 2004 IEP; Student's mother knowingly and voluntarily agreed to the placement recommended in that IEP; there was no request for a 1:1 aide and no need for a 1:1 aide; when Student's mother asked the district to provide additional services and evaluations, they were provided in a reasonably prompt fashion; and the district offered parent training.

The May 24, 2004 IEP Meeting and the Impact of the Absence of a Regular Education Teacher on the IEP Team

18. Before May 20, 2004, Student participated about 20-30 percent of the class day in a regular education environment, with the bulk of his time being spent in special education classes.

Participants to the May 20, 2004 IEP: On May 20, 2004, Student's mother and the two special education teachers providing special education services to Student were present throughout the entire IEP meeting. These teachers were most knowledgeable about Student's special educational levels and needs. Ms. Rex, a special education teacher and the administrative designee, was qualified to supervise the provision of specially designed instruction and related resources and was knowledgeable about the general education curriculum. Ms. Rex attended the last 15-20 minutes of the IEP meeting, when she reviewed Student's IEP plan answered questions about it.

A speech and language pathologist did *not* attend the May 2004 IEP meeting. A regular classroom teacher did *not* attend the May 2004 IEP meeting.

19. Individual Aide: Student's mother did not ask the school to provide Student with an individual aide at the May 2004 IEP meeting. Student had never had an individual aide before that meeting and he had received considerable educational benefit. Nevertheless, it was argued Student should have been given an individual aide in order to receive a FAPE. The provision of an individual aide was pointless in any situation other than Student's full

inclusion in general education classes, a situation that did not exist in the 2004-20005 school year.

20. Speech and Language: According to Ms. Hosko and Ms. Sutherland, the chief concern the mother expressed at the meeting was in helping Student to increase his independence. This concern was noted in the IEP plan. Neither Ms. Hosko, nor Ms. Sutherland, nor Ms. Rex recalled Student's mother asking for another speech and language assessment or asking for the reimplementation of speech and language therapy. The IEP plan stated, "Team also discussed the need for Student's educational focus to be on social skills/communication (speech and language)." That comment did not compel the conclusion that Student's mother requested a speech and language assessment or that he receive speech and language therapy as was argued; to the contrary, that note suggested the main focus of attention within the classroom would be in providing Student with social and communication skills.

Sallie Dashiell (Ms. Dashiell), a licensed speech pathologist, testified she provides services within the private sector and works with several school districts, including the Norco-Corona Unified School District. Ms. Dashiell met with Student on September 17, 2005, at Aprahamian's office in Corona when she administered three and a half hours of speech and language testing. Ms. Dashiell also reviewed portions of Student's cumulative file.

Ms. Dashiell did not prepare a written report. She testified Student stuttered, lacked the fundamental social skills required to communicate effectively and was clearly eligible for speech and language therapy. Ms. Dashiell recommended Student be seen in a one hour pull-out speech and language session twice a week. She also recommended that a speech and language pathologist be part of Student's IEP team.

Ms. Dashiell and Peters used to share a mail box address and residence. They remain good friends and get together a couple of times a week. Ms. Dashiell provides consulting services to TOP Educational Consultants. The relationship between Peters and Ms. Dashiell and the coincidence between Ms. Dashiell's recommendation and petitioner's claim that he needed one hour of speech and language therapy twice a week, which was made three months before Ms. Dashiell evaluated petitioner, raised questions about Ms. Dashiell's credibility.

It was not established that a speech and language evaluation was requested for or during the 2004-2005 school year, or that any language assessment was or should have been conducted between June 1999 and September 2005. Under these circumstances, it cannot be concluded that the district was under a duty to provide one hour of speech and language services twice a week in the 2004-2005 school year.

21. Special Education Placement/Least Restrictive Environment: Student's mother understood and agreed to Student's placement in special education programs as outlined in

the May 2004 IEP. No request was made for placement in general education classes other than PE at the May 2004 IEP meeting or thereafter.

Student's proposed placement included participation in a Life Skills program, which provided him with instruction in a basic curriculum in five domains: recreation and leisure, domestic, community, vocational, and functional academics. The course names for these courses were similar to the names given to general education courses. Students in the Life Skills program received instruction in cooking, meal planning, grooming, self-help skills and interpersonal relationships. Homework assignments were given "to increase responsibility and follow through." Grades were given based upon the student's attendance, preparation, dressing for success, being a team player, and exercising self-control and a good attitude on a daily basis. Students in the Life Skills program were expected to follow all campus rules. Once or twice a week, students in the Life Skills program participated in community based activities that included learning how to use public transportation, getting about safely within the community, and interacting with community members at retail outlets, restaurants and other public places. Non-disabled students did not participate in these community based activities because of their obligation to remain on campus at school.

22. By May 20, 2004, the mother was quite knowledgeable about the benefits and drawbacks of Student being in a regular classroom. Special educational services had been provided in the previous years outside the regular classroom which met with full parent approval. A very recent attempt to have Student spend more of his school day in a less restrictive environment resulted in Student becoming anxious and it interfered with his success in other classes.

The previous IEPs established that Student lacked the academic and social skills required to achieve meaningful academic progress in a regular classroom. Student could not socialize effectively with non-disabled students in a regular classroom due to his emotional fragility. Previous IEPs demonstrated Student's special education placement, particularly in the Life Skills class, had resulted in educational benefit. No new evidence was provided to bring these conclusions into question.

23. Petitioner did not establish how the absence of a regular education teacher at the May 2004 IEP meeting resulted in any loss of educational opportunity or how the absence of a regular education teacher at that meeting seriously infringed upon his parents' opportunity to participate in the IEP process. Petitioner's mother fully participated in the formulation of the 2004 IEP plan, just as she had participated in numerous past IEP meetings which had yielded similar plans. Student's mother was aware that Student's very recent participation in a regular classroom setting resulted in anxiety and hampered his educational progress.

24. Fraudulent Attestation: While the absence of a regular education teacher at the May 2004 IEP meeting did not result in Student's loss of a FAPE, it provided petitioner with probable cause to file a request for a fair hearing. And, the district's oversight having a regular education teacher's signature affixed to the IEP when that regular education teacher

was not present at that meeting was inexcusable. The regular education teacher's signature falsely attested to the proper composition of the IEP team when that was not the case, even though no harm resulted. The teacher who signed the IEP was not called to explain why his signature appeared on the IEP plan and no other reason for it was provided. In the absence of a more reasonable account, it must be concluded that affixing Dennis Taylor's signature to the student's May 2004 IEP was more than an oversight; it was fraud.

25. The failure to ensure the presence of a regular education teacher at the May 2004 IEP meeting and, more importantly, the serious misconduct involved in having a person sign the May 2004 IEP plan on behalf of a person who was not there disqualified the district from recovering any sanctions for petitioner's acts of bad faith in this matter.

Petitioner and the 2004-2005 School Year

26. Student's Placement and Supervision: Student was provided educational services consistent with the May 20, 2004 IEP for most of the 2004-2005 school year. According to Ms. Hosko and Ms. Sutherland and other percipient witnesses, Student made progress and received educational benefit during the 2004-2005 school year. Student continued to have some classroom meltdowns and he continued to stutter when he was under pressure, but he made progress in the area of respecting the personal space of others, he completed his work when indirectly cued, and he gained a sense of future time.

27. Although Student told his parents that his teachers and/or his aides yelled at him in the classroom, absolutely no evidence corroborated that hearsay account. Credible evidence from several persons who were usually present in the classroom established Student was never bullied or yelled at in the classroom.

28. Student was one of six special education students in Mr. Baker's general education P.E. class. An individual aide for one of the six special education students sometimes provided supervision over Student and Student sometimes received assistance from a non-disabled, qualified peer, but he was never left unsupervised during a P.E. class. Student possessed basic athletic skills including running, moving and throwing objects. Student was not a behavior problem.

Student was in Mr. Baker's P.E. class from September 2004 thorough March or April 2005, when he was removed at his mother's request.

At some point in the 2004-2005 school year, Student told his mother he was being bullied in the locker room and his gym clothing and lock had been stolen. Student's mother testified she purchased at least two new sets of gym clothes and several new locks for Student before having him removed from the P.E. class.

There was always some level of adult supervision in the physical education classes in the 2004-2005 school year. One adult was always in the office, one adult was always patrolling the locker room, one adult was always supervising the blacktop area, and one adult

was always present in the hallway. If there had been a report of a disruption, it would have been investigated. Mr. Baker was aware of no reports involving Student.

Mr. Baker never met or spoke with Student's mother before the May 18, 2005 IEP meeting. Mr. Baker was unaware of any incidents in which Student claimed he was bullied in the locker room. Mr. Baker was not aware of any incidents in which Student claimed his gym clothes and locks were stolen.

In spring 2005, Student's mother asked that Student be removed from the P.E. class. Her request was honored. Student spent the rest of the school year at his Life Skill program classroom during the period he would have been in his P.E. class. Student was always supervised by an adult at the Life Skills classroom.

Although Student told his mother he was being bullied in P.E. and his gym clothes had been stolen, absolutely no evidence corroborated that hearsay account. Although Student told his mother he was left unsupervised in the Life Skills program classroom, absolutely no evidence corroborated that hearsay account. Mr. Baker's credible testimony established he was unaware of any bullying or theft incidents involving Student during P.E. Student's mother did not talk to Mr. Baker about any alleged problems before May 18, 2005. Evidence from several adults who were in the Life Skills program classroom established Student was never left unsupervised in that classroom. Student did not participate in swimming classes at the end of the 2004-2005 school year because he was no longer enrolled in P.E. and was ineligible.

29. Improper Displays of Affection: Student became infatuated over summer 2004. At the start of the 2004-2005 school year and thereafter, Student and the girlfriend were often seen together on campus. When the girlfriend talked with other boys at school, Student sometimes became upset and cried. While there was a written rule stating "Student affection is limited only to holding hands at school," Student and his girlfriend sometimes disregarded that rule. Student's overly close physical relationship with the girl and his disregard of the school's student affection rule was brought to his mother's attention.

District personnel did not discipline Student or report these matters in retaliation for Student's or his mother's perceived offenses, as was argued. Ms. Sutherland did not call the girlfriend a "slut."

30. The Threat of Violence and the Response: Shortly before the 2005 Easter vacation, Student's best friend in the special education classroom told Ms. Hock that Student said he felt like killing Ms. Sutherland (or words to that effect). Ms. Hock was very surprised because it was so out of character. Ms. Hock reported the comment to Ms. Sutherland. Ms. Hock and Ms. Sutherland took Student to Assistant Principal Jessie Balderas' office. As soon as Assistant Principal Balderas heard of the incident, he called Student's parents. Student's parents, in turn, immediately came to the Santiago High School to meet with Student, his teachers and Assistant Principal Balderas.

Before the parents arrived, Assistant Principal Balderas interviewed Ms. Hock and Ms. Sutherland. At that time, Student was very upset and had difficulty explaining what occurred. When the parents arrived, they were told about Student's alleged threat. While neither Ms. Hock nor Ms. Sutherland believed Student's statement constituted a real threat, Assistant Principal Balderas took all threats seriously and believed "anything was possible." Assistant Principal Balderas told Student's parents that he intended to suspend Student for two days under Education Code section 48900, subdivision (a). Student's parents did not disagree with the proposed suspension.

The school psychologist, Sarah Pate (Ms. Pate), was not present during the meeting. Assistant Principal Balderas spoke with Ms. Pate the next day. No one recommended Student receive any form of behavioral intervention other than having to take a couple days away from school. A functional analysis assessment (FAA) was not recommended.

Ms. Pate testified that she performs about one FAA a year, and she does so only when actual violence has occurred or is threatened.

It was not established that the circumstances underlying the two-day suspension or the suspension itself justified a functional analysis assessment.

31. Parent Education: Petitioner claimed the district failed to provide "parent education" without specifying exactly what kind of education and how much of it should have been provided.

Student's parents, along with all other parents of special education students, were advised of various meetings, lectures and educational opportunities when the school district sent home notices and flyers concerning such programs. There were meetings once a month on topics including sensory integration, using discrete trial training, using visual schedules to manage behavior, social skills, sensory integration, fostering independence, rituals and routines, mental health issues, functional behavior and transitions to the next grade. An "Inclusion Night" offered parents of IEP students the opportunity to learn about general education opportunities during a two and one-half hour presentation. Student's parents would have been provided with a schedule of meetings for parents of children with autism had that diagnosis been rendered before May or June 2005. The parents were invited to attend in-service training concerning classroom strategies for children with autism, visual support systems, and understanding ADHD and other syndromes.

Student's parents did not ask for individualized training in the 2004-2005 school year.

32. The School's Response to the Mother's Request: Student was removed from Mr. Baker's PE class at the mother's request, even though it was not established school personnel had any knowledge of or confirmed the alleged bullying and thefts.

Ms. Pate administered extensive psycho-educational testing at the mother's request.

Student's threat about killing Ms. Sutherland was determined to be an illusory threat. Nothing more than Student's brief suspension from school was imposed. A behavioral plan was not requested and it was not indicated.

An IEP meeting was convened on May 18, 2005, to discuss parental concerns. That IEP meeting was disrupted when the mother became very upset with Mr. Baker and left the meeting crying. It was not concluded because of time limitations. The annual IEP had not been rescheduled at the time of the hearing, even though the district was ready, willing and able to participate.

Additional Matters

33. Following Student's two-day suspension, the mother kept him out of school for an additional two weeks. Student was evaluated in Utah by a specialist, but no report was produced outlining that individual's diagnosis, if any. Evidently the specialist recommended that Student be evaluated for autism when he returned to California. When the family returned to California, Student's mother contacted Student's therapist to ask for an evaluation to determine if Student had some form of autism. The therapist said he was not qualified and referred the mother to the school.

34. Student and his mother met with Mr. Balderas when Student returned to school from his suspension and the family's trip to Utah. Mr. Balderas told Student not to threaten others. Student said he would not do so.

35. Student's mother spoke with Ms. Pate, who agreed to provide an urgent assessment. During her conversation with Ms. Pate, the mother discussed the circumstances underlying Student's suspension.

36. When Student was not permitted to go swimming with the P.E. class, Student told his mother he wanted to harm Ms. Sutherland. After speaking with Student's therapist about this comment, the mother had Student removed from school for the rest of the semester.

37. At the May 18, 2005, IEP meeting, the mother and father asked for speech and language services, a 1:1 aide, and placement in a general education setting with appropriate accommodations and supports for the 2005-2006 school year. Valerie Aprahamian met several times with the mother before this meeting and was present throughout the May 18 meeting.

Very shortly after the May 18 meeting began, Mr. Baker told the mother he was unaware of any bullying. The mother became quite upset and left the meeting crying. The meeting was not concluded and had to be rescheduled. At the May 18 meeting, there was a plan to have a perceptual-motor development assessment performed by an occupational therapist and a language and speech development assessment performed by a speech and language pathologist.

Student's needs for the 2005-2006 school year were not at issue in this proceeding.

38. Ms Sutherland, Ms. Hosko, Ms. Pate and the mother participated in the formulation of a behavioral analysis, intervention and support recovery plan which is dated May 25, 2005. Ms. Pate authored a comprehensive psycho-educational report dated June 17, 2005.

39. The mother first met Mr. Peters on September 19, 2005, just one day before the hearing started. She has never met Mr. Appel. She never spoke with Dr. Lou Brown (Dr. Brown) or with Dr. Wayne Sailor (Dr. Sailor).

40. Dr. Brown testified by telephone. Dr. Brown has a Ph.D. in Special Education from Florida State. He was active on the faculty at the University of Wisconsin, Madison, from 1969-2003, where he taught students how to teach students with disabilities.

Dr. Brown was first asked to give testimony in this matter the evening before the hearing started. He reviewed Student's May 2004 IEP and the psycho-educational report the morning his testimony was given. Dr. Brown had never met Student and he never spoke with Student's parents. Dr. Brown was not familiar with Student's school or educational program. Dr. Brown never spoke with any of Student's teachers and he did not review Student's cumulative file.

Dr. Brown testified Student was nearly 16 years old and it was time to plan Student's transition from high school to adult life, where Student hopefully would have the opportunity to enjoy a rewarding employment and community experience. Dr. Brown testified Student needed functional skills to accomplish these goals, skills best acquired in an integrated classroom and non-school community settings. Dr. Brown believed Student was responsive to his environment and there was no reason he should not be in a general education classroom, where he would learn survival skills if he were given appropriate accommodations and supports and if the curriculum were modified. Dr. Brown believed Student should travel to and from school with ordinary classmates, attend P.E., have a locker next to others, have a 1:1 aide, and have lunch and other breaks with ordinary classmates. He believed Student should learn how to build social relationships at school and should have concrete experiences from which he could benefit. He should learn money skills, learn to tell time, and learn how to balance a checkbook. All of Student's IEP goals and objectives could be implemented in a general education classroom, according to Dr. Brown. Dr. Brown testified, "I'm not willing to say this kid is destined to be locked up somewhere." It was not clear why Dr. Brown said this in light of the educational opportunities Student was being given. It did not appear to be anyone's plan to have Student locked up somewhere.

Dr. Brown believed Student needed long-term supports, perhaps in a faith-based community. Dr. Brown did not testify that Student's threat necessitated an FAA; rather, the appropriate response depended upon the circumstances of the incident and what was reasonable.

Dr. Brown was obviously an advocate of inclusive education, but he knew next to nothing about Student's unique circumstances and educational setting. Dr. Brown's testimony, as enthusiastic as it was, did not establish that Student received anything less than an appropriate education the 2004-2005 school year, that Student failed to receive educational benefit, that Student should have been provided with a more inclusive education and a 1:1 aide in the 2004-2005 school year, or that Student was not provided with appropriate accommodations, modifications and supports.

The Bad Faith Nature of the Hearing

41. Apart from requesting a due process hearing on the basis of the failure to have a regular education teacher attend the May 2004 IEP meeting, this hearing was brought and prosecuted in bad faith.

The district sought to establish petitioner's request for a due process hearing was filed in "bad faith," presumably with the goal of obtaining findings which could be used to obtain an award of sanctions or attorney's fees against the parents, Appel and/or Peters.[1]

Notice is taken that in a prior hearing, Peters testified he was "a national civil rights education specialist" with a bachelor's degree in Business Administration from Morehouse College and a Juris Doctorate from Atlanta University. Peters does not have a degree in education or special education, although he claimed he had testified before numerous congressional and presidential committees and commissions about special education. Peters has not been licensed to practice law in any jurisdiction in the United States.

42. On May 5, 2003, Peters filed a new fictitious business name statement to do business under the fictitious business names of TOP Educational Consultants and Autism Education Specialists. TOP's business is run out of Peters' residence. The Huntington

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[1] United States Codes, title 20, section 1415, subdivision (i)(B)(i)(III) authorizes the award of attorney's fees as costs to a prevailing State educational agency or local educational agency against the attorney of a parent or against the parent if the complaint or subsequent cause of action was presented for any improper purpose such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.

Under California Code of Regulations, title 5, section 3088, contempt sanctions including the award of expenses as authorized by Government Code sections 11455.10-11455.30 apply to special education due process hearing procedures.

Under California Code of Regulations, title 1, section 1040, an ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. "Actions or tactics" include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ. "Frivolous" means (A) totally and completely without merit or
(B) for the sole purpose of harassing an opposing party.

Beach address listed on his business letterhead was the address of a Mailbox, Etc., where TOP received its mail.

43. Between April 2003 and September 7, 2004, Peters and TOP provided consulting services to parents of special education students attending schools within the district. Peters said all services were billed at the rate of $450 per hour.

44. At a meeting occurring on September 7, 2004, Peters delivered six invoices on the stationary of "Autism Educational & Legal Consultants"[2] to Penny Valentine (Valentine), the district's Administrative Director of Special Education, and Thomas Pike (Pike), the district's Assistant Superintendent, Student Services. The invoices were directed to the district and included charges for consulting services provided to parents by TOP totaling $63,112.50.

Peters told Valentine and Pike he expected the district to reimburse TOP for the consulting services. When Valentine said the district could not pay the invoices, Peters patted her on the shoulder and said, "I'm sure we can work it out." Peters did not threaten to file any requests for due process hearings if the invoices were not paid.

45. On October 4, 2004, Valentine sent a letter to Autism Educational & Legal Consultants. Valentine advised that the district would not pay the TOP invoices for a variety of reasons including the fact that Peters was not an attorney, attorney's fees could be awarded only under specific circumstances, there was no showing TOP's services had resulted in a successful outcome for the students TOP represented, and the district could not disburse funds without appropriate supporting documentation. In that regard, Valentine wrote, "You have not submitted any proof that the parents have paid the amounts listed on your invoices."

46. Peters had numerous contacts with district staff between October 4, 2004 and May 24, 2005. The subject of the district's refusal to pay the invoices was never mentioned in those contacts.

47. A student from the district was fatally stabbed sometime in spring 2005. Peters contacted the district and arranged to meet with Pike and Superintendent Lee Pollard on May 24, 2005. Ultimately Peters, Valerie A., Pike and Pollard attended that May 24 meeting.

The meeting began with a discussion of the fatal stabbing. Peters claimed he had predicted violence in earlier meetings, he offered to involve the Reverend Jesse Jackson in a community healing process, and he discussed racism within the community. Peters then vaguely referred to special education problems within the district. When Pike asked Peters if

[2] TOP does not have attorneys on its staff, although it employs private attorneys on a case-by-case basis as needed.

the real purpose of the meeting was to discuss the district's nonpayment of the six invoices, Peters said there were "many ways to pay the bills."

Peters did not bring the invoices to the meeting, but he ultimately gave the district a deadline by which to pay the six invoices. When Superintendent Pollard asked for an extension of the deadline to obtain legal advice, Peters said he would extend the deadline through June 3, 2005. Peters then said if the bills were not paid by the deadline, he would "file on those cases and the other ones we have."

While the word "threat" was not used, a threat was clearly implied.

48. On June 3, 2005, Superintendent Pollard sent a letter to Peters. Pollard's letter stated in part:

"When we spoke you stated that you would file on those cases and the other ones we have unless [the district] committed by May 27, 2005 to pay your bill. You later stated that you would wait until today but you reiterated your statement that unless we paid your bill you would file requests for due process hearings on your previous cases and current cases. This appeared to me and Mr. Pike to be a demand of payment to which you do not appear to be entitled under threat of unnecessary due process filings. The district is willing and able to address any outstanding issues in any cases you or Ms. Aprahamian, who represented herself as your agent), may currently have."

49. Peters did not reply to Superintendent Pollard's June 3 letter.

50. On June 10, 2005, Attorney Constance Taylor wrote to Peters on behalf of the district and advised him of the reasons the district would not pay his consulting fees. Taylor wrote:

"You have informed District Superintendent Lee Pollard that if the District does not pay your consulting fees, which were incurred by the parents of District students, you will file requests for due process hearings for all the students you represent."

51. On June 27, 2005, Peters and Appel filed a dozen requests for due process hearings, one of which involved the student in this matter.

On July 1, 2005, Peters, again in association with Appel, filed another request for a due process hearing.

In a previous hearing, Peters testified he actually received about $20,000 from the parents of the $63,000 that was billed in the invoices.

52. In a previous hearing, Peters denied engaging in bad faith, claiming the "bad faith" issue was a "red-herring" and part of a conspiracy that "came up in back rooms." Peters said the parents for whom the due process requests were filed had legitimate concerns

and, despite his effort to keep those parents from filing requests for hearings by suggesting the district was sincerely interested in resolving special education problems, when the district "turned its nose up at the program it became apparent there would be no change" the due process requests had to be filed.

Peters said the simultaneous filing of the complaints had nothing to do with the district's written denial of payment and the fact they were filed on the same day was merely coincidental. Peters noted the issue statements in the requests did not request attorney's fees, although he conceded he knew a prevailing parent in a special education due process action could recover attorney's fees even when payment of attorney's fees had not been requested.

53. Peters' previous testimony that he had no improper motive in filing the due process requests was not believable. The request for a due process hearing in this action was filed on the same day as eleven others and it was filed to harass the district by needlessly causing the district to incur unnecessary litigation expenses. Peters subjectively acted in bad faith.

54. Appel made no appearance in this matter. In a previous matter, Appel testified he did not have written authorizations from the parents to file due process requests. Appel said he reviewed information he was given and concluded there was probable cause to file the requests for hearing. Appel admitted he did not speak with the parents to confirm their desire to file a request for a hearing.

Appel charged his clients $450 per hour, the same rate charged by TOP for its consulting services. Appel admitted he never litigated any due process hearing before this one. He was actively involved in special education matters for eighteen months, although he once appeared in federal court on Peters' behalf about three years ago.

55. Appel did not participate in the May 24, 2005 meeting where Peters made the threat to file due process requests if TOP's bill was not paid. As lead counsel for TOP, Appel knew about the district's refusal to pay TOP's invoices and he knew of Peters' threat to file due process requests if the district did not make payment.

Appel, as a licensed attorney, was required to counsel or maintain only those actions, proceedings or defenses as appeared to him legal or just (Bus. & Prof. Code § 6068, subd.(c)), he was required to use only those means available to him that were consistent with truth in representing his clients (Bus. & Prof. Code § 6068, subd. (d)), and was under a duty not to encourage the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest. (Bus. & Prof. Code § 6068, subd. (g)).

56. Appel never consulted the parents in this matter. Appel's professional capacity was critical in filing the requests for due process hearings if attorneys' fees were going to be awarded. Appel knew or should have known that filing a claim in this matter was frivolous, without merit and solely designed to harass the district. Appel acted with subjective bad faith.

57. The presentation of the student's case at hearing demonstrated an absolute lack of attention, preparation and concern for the student's situation and it ultimately underscored the extent to which Peters and Appel considered the action to be without merit and the extent to which they acted in bad faith.

Petitioner's parents did not meet with Mr. Peters, the educational consultant, until the day before the due process hearing. They never met with Mr. Appel, the self-proclaimed "lead counsel." Subpoenas were not issued to compel the attendance of witnesses until the day before the hearing. The speech and language expert did not conduct an assessment until three days before the hearing and she did not prepare a report. The expert witness in the area of inclusion – Dr. Lou Brown - was not contacted until the evening before the hearing and he was not provided with adequate documentation to form any kind of meaningful expert opinion; about a dozen district employees were subpoenaed – including secretaries, an Assistant Superintendent and the Superintendent of Schools - who had no relevant, personal knowledge about any matter at issue. They were subpoenaed simply to disrupt the educational process.

58. The contention that Peters' misconduct in this proceeding was not in bad faith or was unintentional is particularly unavailing. Peters has a record of similar past misconduct for which he was ordered to pay sanctions.[3]

In *Ocean View Elementary School District & West Orange County Consortium for Special Education* (2002) SEHO Case No. 1982, Hearing Officer Trevor Skarada imposed sanctions in the form of "reasonable costs, including attorney's fees" against Peters.

Following a recital of various acts of misconduct, the hearing officer concluded:

"These actions are especially reprehensible because [Peters] holds himself out as an educational advocate and he represents other children in due process hearings. His abusive and delaying tactics serve no useful purpose and make a mockery of the due process system; they cannot be condoned."

59. The request for a hearing in this matter was filed primarily out of spite. Peters wanted the district to know he would make good on his threat to file numerous requests for due process hearings if the district refused to pay TOP's bill. Appel assisted Peters in carrying out that threat. Appel and Peters held themselves out as educational advocates. The abusive tactics evidenced in this matter served no useful purpose and made a mockery of the due process system.

[3] Notice is taken of orders and decisions rendered in special education due process hearings under California Code of Regulations, title 5, section 3085.

60. It would be recommended that full sanctions be awarded to the district were it not for the district's unclean hands in this matter, as outlined in Factual Findings 6, 18, 24 and 25.

LEGAL CONCLUSIONS

General Applicable Law

1. The purpose of IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 U.S.C. § 1400(d).

The term "special education" in federal law means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29). California Education Code section 56031 augments this definition to include "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction."[4]

A free appropriate public education (FAPE) is one provided at public expense, under public supervision and direction, and in conformity with an individualized education program (IEP) which is developed for the child. 20 U.S. C. § 1401(8). The obligation to provide a FAPE does not require a state to "maximize each child's potential." *Board of Education of Hendrick Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 198; see also 20 U.S.C. § 1401(8)(D).

IDEA contains numerous procedural steps that a state must follow to design and implement an IEP. See 20 U.S.C. § 1414(d). The district is responsible for assembling an appropriate IEP team to draft and implement disabled student's IEP. 20 U.S.C. § 1414(d).

The IEP is the blueprint for successfully formulating and achieving the goal of IDEA. *Murray v. Montrose County School District* (10th Cir. 1995) 51 F.3d 921, 925; see also 20

[4] Education Code section 56031 also provides "special education" is an integral part of California's total public education system and special education provides education in a manner that promotes maximum interaction between children or youth with disabilities and children or youth who are not disabled in a manner that is appropriate to the needs of both. Special education includes a full continuum of program options, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education, to meet the educational and service needs of individuals with exceptional needs in the least restrictive environment.

U.S.C. § 1401(11). IEPs should provide a "basic floor of opportunity" consisting of services "individually designed to provide educational benefit." *Rowley*, 458 U.S. at 201. An IEP need not conform to a parent's wishes to be sufficient or appropriate. *Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139.

Least Restrictive Environment

2. Federal law requires:

> "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5).

The LRE requirement shows Congress's strong preference in favor of mainstreaming, but it does not require or even suggest doing so when the regular classroom setting provides an unsatisfactory education. *Beth B. v. Van Clay* (7th Circuit, 2002) 282 F.3d 493, 497.

Technical Deviations – Harmless Errors

3. Technical deviations in developing an IEP do not automatically lead to the conclusion that the IEP is invalid. *Urban v. Jefferson County School District R-1* (10th Cir. 1996) 89 F.3d 720, 726. Only procedural violations which result in a "loss of educational opportunity" or which "seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE." *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.[5]

Impact of a District's Failure to Include a
Regular Education Teacher on the IEP Team

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[5] 20 U.S.C. § 1415, subdivision (f)(3) now provides:

"(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

4. 20 U.S.C. § 1414, subdivision (d)(1)(B) defines an "IEP team" as:

> "(i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.

Attendance by all IEP team members is not required "if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting." 20 U.S.C. § 1414, subdivision (d)(1)(B).

What is the legal effect of the district's failure to have a regular education teacher attend Student's IEP meeting?

The amended opinion in *M.L. v. Federal Way School District* (9th Cir. Wash. 2005) 394 F.3d 634 was authored by Senior Circuit Judge Arthur L. Alarcon. He concluded a school district's failure to include a regular education teacher on the IEP team significantly deviated from the procedural requirements of IDEA and constituted a "structural defect" which necessarily precluded the court from considering whether a disabled student received a FAPE.

Circuit Judge Ronald M. Gould agreed with most of Judge Alarcon's opinion, but he did not agree with "structural defect" analysis compelling the conclusion the student was denied a FAPE. Judge Gould concluded the error of the composition of the IEP team under the circumstances of the case[6] violated IDEA and required reversal of an order granting summary judgment.

Judge Richard R. Clifton dissented. Judge Clifton, like Judge Alarcon and Judge Gould, concluded the school district should have included a regular classroom teacher on the IEP team and the failure to do so was a procedural violation of IDEA, but that procedural error did not prevent the student's parents from participating in the formulation of the IEP

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[6] M.L. had been in a classroom with a dozen or so nondisabled students, one of his teachers recommended M.L remain in a typical classroom, and M.L.'s past IEPs and placements demonstrated that it was possible that M.L. could be placed in a regular education classroom.

and it did not result in the student's loss of an educational opportunity, as determined by the hearing officer.

The decision in *M.L. v. Federal Way School District* was discussed in footnote 2 of District Court Judge David S. Doty's opinion in *Pachl v. Seagren* (D. Minn 2005) 373 F.Supp.2d 969, 974 as follows:

> "Plaintiffs cite *M.L. v. Federal Way School District*, 387 F.3d 1101, 1103 (9th Cir. 2004), amended by 394 F.3d 634 (9th Cir. 2005), and suggest that procedural errors under IDEA are not subject to harmless error analysis. In M.L., two members of the three-judge panel concluded that harmless error analysis does indeed apply to procedural violations of IDEA. See id. at 651-52 (Gould, J., concurring in part and concurring in the judgment); id. at 658 (Clifton, J., dissenting). Only Judge Alarcon, who announced the judgment of the court, broke with his colleagues on the panel and perhaps the entire Ninth Circuit bench to opine that procedural errors should be subjected to 'structural error' analysis. See id. Therefore, plaintiffs' citation of *M.L.* has very little persuasive force."

The Impact of a School's Indifference to Teasing

5. Under IDEA, a disabled child is guaranteed a FAPE. If a teacher is deliberately indifferent to the teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *M.L. v. Federal Way School District* 387 F.3d 1101, 1116-1117 (9th Cir. Wash. 2004).

Behavioral Intervention Plans and
Functional Analysis Assessments

6. Federal Authority: 20 U.S.C. § 1414, (k)(1) essentially provides that in determining whether to order a change in the placement, the school may consider any unique circumstances on a case by case basis and may suspend a disabled student for not more than 10 school days. A child with a disability who is removed from current placement for a period exceeding 10 days must receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

Code of Federal Regulations, title 34, section 300.520 provides:

"(a) School personnel may order-

(1)(i) To the extent removal would be applied to children without disabilities, the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules, and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of

misconduct (as long as those removals do not constitute a change of placement under Sec. 300.519(b));

Code of Federal Regulations, title 34, section 300.519 provides:

"For purposes of removals of a child with a disability from the child's current educational placement under Secs. 300.520-300.529, a change of placement occurs if-

(a) The removal is for more than 10 consecutive school days; or

(b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another."

7. California Authority: Under Education Code section 48900, subdivision (a), a student may be suspended from school for threatening to cause physical injury to another person.

California Education Code section 48900.5 provides that a suspension shall be imposed only when other means of correction fail to bring about proper conduct. A pupil, including an individual with exceptional needs, may be suspended for any of the reasons enumerated in Section 48900 upon a first offense if the principal or superintendent of schools determines that the pupil violated Education Code section 48900 or if the pupil's presence threatens to disrupt the instructional process.

California Education Code section 48911 authorizes the principal of a school or his designee to suspend a pupil for any of the reasons enumerated in Education Code section 48900 and under Education Code section 48900.5 for no more than five consecutive schooldays. The suspension must be preceded by an informal conference conducted by the principal or his designee and the pupil and, whenever practicable, the teacher, supervisor, or school employee who referred the pupil to the principal.

California Code of Regulations, title 5, section 3001 provides in part:

"(d) 'Behavioral intervention' means the systematic implementation of procedures that result in lasting positive changes in the individual's behavior. 'Behavioral intervention' means the design, implementation, and evaluation of individual or group instructional and environmental modifications, including programs of behavioral instruction, to produce significant improvements in human behavior through skill acquisition and the reduction of problematic behavior. 'Behavioral interventions' are designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive educational environment as outlined in the individual's IEP. 'Behavioral interventions' do not include

procedures which cause pain or trauma. 'Behavioral interventions' respect the individual's human dignity and personal privacy. Such interventions shall assure the individual's physical freedom, social interaction, and individual choice.

. . .

(f) 'Behavioral intervention plan' is a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP. The 'behavioral intervention plan' shall become part of the IEP. The plan shall describe the frequency of the consultation to be provided by the behavioral intervention case manager to the staff members and parents who are responsible for implementing the plan. A copy of the plan shall be provided to the person or agency responsible for implementation in noneducational settings. The plan shall include the following:

(1) a summary of relevant and determinative information gathered from a functional analysis assessment . . . "

California Code of Regulations, title 5, section 3052, subdivision (a) authorizes the development and implementation of a behavioral intervention plan. Behavioral intervention plans must be based upon a functional analysis assessment, must be specified in the IEP, and must be used only in a systematic manner in accordance with the provisions of the regulation. Behavioral emergency interventions shall not be used as a substitute for behavioral intervention plans.

California Code of Regulations, title 5, section 3052, subdivision (b) authorizes functional analysis assessments. A functional analysis assessment must occur after the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, but a parent or legal guardian from requesting a functional analysis assessment under Education Code sections 56320 et seq. Under this subdivision, functional analysis assessment personnel gather information from three sources: direct observation, interviews with significant others, and review of available data such as assessment reports prepared by other professionals and other individual records. Before conducting the assessment, parent notice and consent shall be given and obtained.

Under California Code of Regulations, title 5, section 3052, subdivision (c), upon the completion of the functional analysis assessment, an IEP team meeting must to review results and, if necessary, to develop a behavioral intervention plan. The behavioral intervention plan becomes part of the IEP and must be written with sufficient detail to direct the implementation of the plan.

Determination of Issues

The district provided Student with a FAPE in the 2004-2005 school year. The credible expert testimony established Student was provided with an individualized program

reasonably calculated to provide him with meaningful educational benefits. The evidence did not establish a rational basis to conclude that a procedural inadequacy or the district's failure to include a regular education teacher on the May 2004 IEP team meeting compromised Student's right to an appropriate education or seriously hampered his parents' opportunity to participate in the IEP process. Student did not suffer severe bullying or teasing at school.

More specifically:

1. The district had no obligation to provide Student with one hour of speech and language services twice a week in the 2004-2005 school year.

Student's May 2004 IEP did not require the provision of speech and language services. Student previously received speech and language therapy, but the program was terminated in 1999 after a speech and language pathologist determined Student had demonstrated continuing language development within the classroom, special day class settings would support the development of language skills, and Student's future needs could be provided within a classroom setting. Student's parents did not request the provision of additional speech and language services until May 2005. It is unclear at this point that Student actually would benefit from such services.

2. The district was not obligated to provide Student with an individual aide.

Student never had a full time individual aide before the 2004-2005 school year and obtained educational benefit. His mother did not ask the school to provide Student with an individual aide at the May 2004 IEP meeting. Student was not placed in a general education classroom in the 2004-2005 school year and the provision of an individual aide in his special education setting was not required.

3. The district reasonably did not place Student in a general education classroom in the 2004-2005 school year.

Although the district failed to include a regular education teacher on Student's IEP team, this procedural error did not prevent Student's parents from participating in the formulation of Student's IEP and it did not result in Student's loss of an educational opportunity. The "structural defect" analysis is rejected.

Student had nine or ten IEPs prepared before the May 2004 IEP meeting. There was no claim those IEP teams were improperly constituted. Mention was made in the prior IEPs that Student would not easily access the curriculum if he were placed in a general education classroom. Student made educational progress every school year with one exception – the year he was more fully included with general education students.

4. The district did not fail to provide Student's parents with more training than it offered, which was a reasonable amount of training under the circumstances.

Student's parents were advised of various meetings, lectures and educational opportunities related to Student's special needs. An "Inclusion Night" offered Student's parents the opportunity to learn about general education opportunities over a two and one-half hour presentation.

Student's parents did not ask for individualized training in the 2004-2005 school year.

5. The district had no obligation to conduct an FAA for Student.

The IEP team did not find that instructional/behavioral approaches being provided to Student under the May 20, 2004 IEP were ineffective and Student's parents never requested a functional analysis assessment. Student was not suspended for more than 10 school days.

Prevailing Party

1. This District prevailed on Issue 1.

2. The District prevailed on Issue 2.

3. The District prevailed on Issue 3.

4. The District prevailed on Issue 4.

5. The District prevailed on Issue 5.

ORDER

The complaint is dismissed.

Dated: October 18, 2005

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JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings